MOTION FILED AUG 7 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD., KAWASAKI KISEN KAISHA, NISSAN KISEN KAISHA, LTD., TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD., MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S RESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD., NEDERLANDSCHE STOOMVAART MAATSHAPPIJ "OCEAAN" N.V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.;

Petitioners,

— against —

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO FILE BRIEF AND BRIEF *AMICUS CURIAE*, SUBMITTED ON BEHALF OF THE STEAMSHIP CONFERENCES, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, AND THEIR MEMBER LINES LISTED IN APPENDIX A

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Petitioners,

— against —

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come movants, the thirty-five Conferences, Pacific American Steamship Association, and the one hundred fifteen common carrier steamship lines which comprise their membership, listed in Appendix A below, and respect-

fully move this Court for leave to file the accompanying brief in this case *amicus curiae*.

Consent for the filing of this brief was requested of and has been obtained from the following petitioners and respondents: United States of America; Federal Maritime Board, Ezra Taft Benson, Secretary of Agriculture, Japan-Atlantic and Gulf Freight Conference and its member lines.

The consents from all the foregoing have been filed with the Clerk of this Court. Consent for filing of this brief was requested of the respondent, Isbrandtsen Company, Inc., but was refused by its counsel, John J. O'Connor, Esq., on July 20, 1957. This was the only refusal.

None of the moving steamship lines are parties to this action. However, they are all members of various steamship rate-making Conferences, which are concerned with the determination of the issues herein as such determination may constitute a precedent in the interpretation and application of the Shipping Act, 1916. These Conferences were organized under agreements filed with and approved by the Federal Maritime Board, or its predecessors, pursuant to the provisions of Section 15 of the Shipping Act, 1916 46 U. S. C. Section 814. The Conferences were formed for the purpose of co-operative membership action in the fixing of freight rates for the transportation of cargo between United States ports on the East, Gulf, and West Coasts of the United States and foreign countries throughout the rest of the world. The Conferences have their principal offices at the following places: New York, New York; San Francisco, California; Los Angeles, California; New Orleans, Louisiana; and various ports of other countries in the Eastern and Western Hemispheres. The steamship lines are corporations organized and existing by virtue of the laws of various states of the United States and foreign countries, having offices or representatives in several states of the United States. They are all engaged as common carriers by water in foreign commerce between ports of the United States and the foreign areas indicated

by the Conference names. Pacific American Steamship Association (hereinafter referred to as the "Association") is an organization composed wholly of American common carrier steamship lines, operating between the West Coast of the United States and various other ports throughout the world.[1]

The Conferences and the steamship member lines are subject to the jurisdiction of the Federal Maritime Board. Acting under Conference agreements, the Conferences and their member lines have for many years maintained systems of exclusive patronage contracts with shippers under which one set of rates is offered to those shippers who do not contract in advance to ship exclusively on the vessels of Conference members, and another lower schedule of rates is offered to those who contract in advance to ship exclusively on the vessels of Conference members.

Rate structures have been determined thereunder and trade relationships have developed and flourished in the trades served by the Conferences and carriers on whose behalf this motion is made. Until the decision below in the Court of Appeals, the question of the lawfulness of dual rate systems has been one on which the carriers and Conferences have looked to the Federal Maritime Board for guidance for many years. The carriers believed that the Board was entrusted with the responsibility of determining as a fact whether any particular contract rate system should be approved under the Shipping Act, 1916.

In the present case the Board found that the dual-rate system, as it would be employed by petitioners, was a proper one in that it was necessary to maintain rate stability in the Japan-Atlantic & Gulf trade and to prevent destructive rate wars; that the proposed spread between contract and non-contract rates was reasonable; and that the proposed dual-rate system should be approved pursuant to the provisions of Section 15 of the Shipping Act. The

[1] The only common carrier steamship members of the Association who are parties to this motion and attached brief are those which use dual-rate systems.

Court of Appeals in this case set the Board's order aside on the ground that the dual-rate system was unlawful under Section 14, Third of the Shipping Act.

Movants earnestly desire that a reasonably short brief be filed on their behalf in order that the Court may have before it the point of view of these Conferences, the Association, and their steamship member lines, because the decision in this case might have far-reaching consequences for them and the public. The steamship lines are concerned lest the law may now be interpreted as proscribing the dual-rate systems which they have maintained over many years, with the specific knowledge of the Federal Maritime Board and with general recognition thereof by Congress. As members of Conferences, most of which have employed for many years the dual-rate system, the carriers have a vital interest in these issues. They are concerned with the protection of established business relationships and are naturally anxious that economic ties which have been built up over the past thirty years shall not be destroyed. This would be the inevitable result of affirmance of the decision below.

Thousands of American shippers and consignees, as parties to dual-rate contracts have valuable rights thereunder, particularly during a period of rising freight rates and shortage of shipping tonnage. Therefore, these Conferences and the carriers employing the dual-rate system are moving to file the attached brief *amicus curiae* in this proceeding to safeguard the contractual interests of all parties—shippers, consignees and carriers.

The considerations of public policy that attach to their purpose are important at any time. They are particularly important at the present time because the future of this nation and even its survival may depend upon the continuity of well ordered trade relationships and a strong, vigorous, and healthy Merchant Marine.

The question of whether the contract, non-contract rate system is illegal *per se* is one of the utmost seriousness to

the shipping public and the Conferences. Their member lines are leading steamship carriers in trades which reach all parts of the world. Movants believe that they will be able to place before this Court considerations supplementing those which will be urged by the parties to this case and which will be of assistance to the Court. Nevertheless, they will not be of such length as to be burdensome to the Court.

The parties to the case in the Court below and in this Court must necessarily concern themselves with the specific issues of the case. Movants believe that these issues need to be considered within a larger economic and historic framework than the petitioners and respondents could develop for the Court. Movants will be able to show to the Court the widespread interest of the shipping industry in the issues presented and demonstrate the worldwide effect of the decision below on this industry, which petitioners and respondents will not do. Movants believe that the arguments they present are indispensable to a proper decision of this Court.

For the foregoing reasons, it is respectfully requested that this application for leave to file a brief as *amici curiae* be granted.

Respectfully submitted,

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APPENDIX A

STEAMSHIP CONFERENCES

Associated Steamship Lines (Manila)
Atlantic and Gulf-Indonesia Conference
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference
Atlantic and Gulf-Singapore, Malaya and Thailand Conference
Atlantic and Gulf/West Coast of Central America and Mexico Conference
Atlantic and Gulf/West Coast of South America Conference
Brazil/United States-Canada Freight Conference
Calcutta/U. S. A. Conference
Deli/New York Rate Agreement
East Coast Colombia Conference
East Coast South America Reefer Conference
Far East Conference
Gulf/French Atlantic Hamburg Range Freight Conference
Gulf/Mediterranean Ports Conference
Gulf/United Kingdom Conference
Havana Northbound Conference
Havana Steamship Conference
India, Pakistan, Ceylon & Burma Outward Freight Conference
Java-New York Rate Agreement
Leeward & Windward Islands & Guianas Conference
Mid Brazil/United States-Canada Freight Conference
New York Freight Bureau (Hong Kong)
North Brazil/United States-Canada Freight Conference
Pacific Indonesian Conference
Pacific Straits Conference
Pacific Westbound Conference
River Plate and Brazil Conference
River Plate/United States-Canada Freight Conference
Santiago de Cuba Conference
Straits/New York Conference
U. S. Atlantic and Gulf/Australia-New Zealand Conference
U. S. Atlantic & Gulf Ports-Jamaica (B. W. I.) S. S. Conference

U. S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference
United States Atlantic & Gulf-Haiti Conference
West Coast South America Northbound Conference
Pacific American Steamship Association*

THE FOLLOWING COMMON CARRIER STEAMSHIP LINES ARE MEMBERS OF ONE OR MORE OF THE FOREGOING CONFERENCES:

Aktieselskabet Atlas
Aktiebolaget Svenska Amerika Linien
Alcoa Steamship Company, Inc.
American Export Lines, Inc.
American Mail Line, Ltd.
Angfartygsaktiebolaget Tirfing
Armement Deppe, S.A.
A/S Atlantica
A/S J. Ludwig Mowinckels Rederi
Atlantic Ocean Transport Corporation
Bloomfield Shipping Company
Booth American Shipping Corporation
Buccaneer Line, Inc.
Cia. Argentina de Navegacion Dodero
Compagnie de Transports Oceaniques
Compagnie Generale Transatlantique
Compagnie Maritime Belge, S.A.
Compagnie Maritime Congolaise, S.C.R.L.
Compania Colombiana de Navegacion Maritima
Compania de Navegacion Dalpha, S.A.
Compania Maritima del Nervion
Compania Naviera Cubamar, S.A.
Compania Sud Americana de Vapores
Compania Transatlantica Espanola, S.A.
Dampskibsaktieselskabet Alaska
Dampskibsaktieselskabet Golden Gate
Dampskibsaktieselskabet Idaho
Dampskibsaktieselskabet Jeanette Skinner

* Association of United States steamship lines operating from the west coast of the United States.

Dampskibsaktieselskabet Lisbeth
Dampskibsselskabet Torm
Deutsche Dampfschiffahrts-Gesellschaft "Hansa" Bren
(Germany
Dovar S.A. International Shipping & Trading Co.
Eckert Steamship Corp.
Ellerman Lines, Ltd.
Ellerman & Bucknall Steamship Co., Ltd.
Federal Steam Navigation Co., Ltd.
Flota Mercante del Estado
Flota Mercante Grancolombiana, S.A.
Grace Line, Inc.
Gulf & South American Steamship Co., Inc.
Hall Line, Ltd.
Hamburg Amerika Linie
Hamburg-Suedamerikanische Dampfschiffahrts
Gesellschaft Eggert & Amsinck
Hellenic Lines Limited
Hugso Stinnes O. H. "Brenntag", Brennstoff-,
Chemikalien-und Transport, G.m.b.H.
Hvalfangstaktieselskapet Suderoy
Isthmian Lines, Inc.
Israel America Line, Ltd.
Khedival Mail Line, S.A.E.
Koninklijke Rotterdamsche Lloyd, N.V.
Lamport & Holt Line, Ltd
Larrinaga Steamship Co., Ltd.
Lloyd Brasileiro
Marina Mercante Nicaraguense, S.A.
Matson Navigation Company
M. Dizengoff & Co. (Shipping) 1949, Ltd.
M. Dizengoff & Co. (Navigation) 1951, Ltd.
Mississippi Shipping Co., Inc.
Moore-McCormack Lines, Inc.
Naviera Vacuba, S.A.
Navigazione Alta Italia-Genoa
New Zealand Shipping Co. Ltd.
Norddeutscher Lloyd
North Atlantic & Gulf Steamship Company, Inc.
Nitto Shosen Co. Ltd.
N. V. Koninklijke Paketvaart Maatschappij

N. V. Nederlandsch-Amerikaansche Stoomva
Maatschappij-"Holland-Amerika Lijn"
N. V. Stoomvart Maatschappij "Nederland"
Ozean Linie G.m.b.H.
Pacific Far East Line, Inc.
Pacific Transport Lines, Inc.
Panama Canal Company
Philippine National Lines
Port and Associated Lines
Prince Line, Ltd.
Prudential Steamship Corporation
Rederiaktiebolaget Disa
Rederiaktiebolaget Fredrika
Rederiaktiebolaget Poseidon
Rederiaktiebolaget Svenska Lloyd
Royal Netherlands Steamship Company
Skibsaktieselskapet Abaco
Skibsaktieselskapet Arizona
Skibsaktieselskapet Aruba
Skibsaktieselskapet Astrea
Skibsaktieselskapet Marie Bakke
Skibsaktieselskapet Noruega
Skibsaktieselskapet Ogeka
Skibsaktieselskapet Pacific
Skipsaksjeselskapet Hilda Knudsen
Skipsaksjeselskapet Samuel Bakke
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Skagerak
Skipsaktieselskapet Vito
States Steamship Company
Stockard Steamship Corporation
Stockholms Rederiaktiebolag Svea
The Bank Line Limited
The Booth Steamship Co., Ltd.
The City Line, Ltd.
The Cunard Steam-Ship Company Ltd.
The East Asiatic Company, Ltd.
The Northern Pan-America Line, A/S
Thos. and Jas. Harrison, Ltd.
Thos. & Jno. Brocklebank, Ltd.

Three Bays Corp., Ltd.
United Fruit Company
Van Nievelt, Goudriaan & Co.'s Stoomvaart Maatschappij N.V.
Victorias Milling Company, Inc.
Ward Garcia, S.A.
West Coast Line
Westfal-Larsen & Co., A/S
Westley Shipping Co., Inc.
Zim Israel Navigation Co., Ltd.

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Statement of Interest.

The parties on behalf of whom this brief *amicus curiae* is filed are thirty-five Conferences, Pacific American Steamship Association (hereinafter referred to as the "Association"), and their common carrier steamship member lines, operating to and from all the major ports of the United States in foreign commerce. The parties embrace *inter alia* almost every subsidized common carrier now operating on trade routes considered to be essential by the American Government and subsidized by the Government under the jurisdiction of the Federal Maritime Administration and Board.

American flag carriers and most of their foreign flag competitors have grouped themselves into Conferences. The purpose of these Conferences is to assure that all of the carriers in a given trade shall charge uniform rates to all shippers, large and small, to avoid wide and frequent fluctuations in freight rates, and to take all other steps necessary for the development of American commerce. The Conferences have been organized and operate under Agreements made among the member steamship lines. These Agreements, together with all changes and modifications, have been approved by the Federal Maritime Board[1] pursuant to Section 15 of the Shipping Act, 1916, 46 U. S. C. Section 814. Generally speaking, each Conference embraces common carriers, both American and foreign, operating between the Gulf, the East or the West Coasts of the United States, on the one hand, and some other unified geographical sector in either the Eastern or Western Hemisphere which can be reached by a water route. The common carrier members of the Association operate to and from Pacific coast ports in international trade.

The Conferences and all individual lines, parties to this

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[1] Throughout this brief the Federal Maritime Board, the Maritime Commission and all earlier agencies which have administered the Shipping Act are collectively referred to as "the Board".

brief, have established dual-rate systems, under which each has made available uniform rates for shippers in their respective trades at two levels. The lower rate level has been made available to all shippers, large or small, who contract in advance with the member lines of the Conference to confine all of their shipments to the ships of the member lines either during a stated period or an indefinite period terminable after a stated interval of notice by either party. There are varying collateral promises made by both sides. The higher level of rates is offered shippers who for business or other reasons do not elect to assume the obligations imposed by the contracts. During the period that these contract rate systems have been operating, the member lines of the Conferences and the Association have invested billions of dollars in ships, in ships' terminals, and all of the other facilities needed to carry the cargo of American shippers in foreign commerce. The carriers, parties to this brief, operate hundreds of vessels of all types in the foreign commerce of the United States today.

The Conferences for whom this brief is filed, did not participate in the proceedings before the Board or the Court of Appeals. However, the scope of the decision rendered by the Court of Appeals, if read literally, is so broad that these Conferences and their members are anxious to lay before this Court on their own behalf and on behalf of the many thousands of merchants benefited by the contracts their reasons for believing that the Court below erred and to show this Honorable Court the far-reaching economic impact of the decision below.

This brief will endeavor to show this Court that, contrary to assertions by Isbrandtsen and the Departments of Agriculture and Justice, Congress, in enacting the Shipping Act, provided a basis for approval of dual-rate systems and that the economic reasons which made such systems necessary in 1916 are even more cogent today, so that instead of being illegal *per se* such systems are necessary

to promote the foreign commerce of the United States within the meaning and purpose of the Shipping Act.

Each of the Conferences has as its primary purpose the maintenance of agreed rates among the members at levels which will permit an unrestricted interchange of merchandise and attempt to insure at least a minimum return on investment and thereby guarantee necessary replacement and modernization of tonnage. The Conferences strive to meet both the general and the special transportation requirements of the shippers in their trade. In that respect they are constantly seeking to maintain a regular, dependable pattern of service for the convenience of the shippers and to make available to the shippers the latest technological advances.

There are non-conference steamship lines maintaining berth services in some of the trades served by the member lines. In every instance, membership in these Conferences is open to Isbrandtsen or to any other common carriers intending in good faith to operate regularly in any of these trades.

Summary of Argument.

From the language of the Shipping Act, 1916, itself and its legislative history, it is clear that the dual rate system is not illegal *per se*. Prior to the enactment of the Shipping Act, the Courts had already determined that an exclusive patronage dual-rate system was not illegally discriminatory. In the case of *Menacho* v. *Ward*, 27 Fed. 529 (S. D. N. Y., 1886) discrimination for past patronage of an outside line was recognized and condemned. The Court below in the present case did not appreciate the distinction made by the earlier courts and failed properly to distinguish between advance, contractual commitments and conduct which in fact constitutes retaliation.

The Shipping Act, 1916, reflects the Alexander Committee's analysis of Conference competitive methods which

was accepted by Congress. The Alexander Report shows the Committee's awareness of the competitive methods used by Conferences operating in the United States and Great Britain. The Conferences at that time had striven to protect themselves from the tramp operator and outside lines principally by the deferred rebate and the dual-rate system. The Committee pointed out that the dual-rate system gave the shipper a free election at all times and that the undesirable element of postponement and possible retaliation which could be found in deferred rebate systems was not present in the dual-rate systems.

Since the enactment of the Shipping Act, 1916, during years in which conferences domiciled in the United States continued to use the dual-rate system, Congress frequently dealt with merchant shipping affairs and hearings were held from which evolved the Merchant Marine Acts of 1920, 1928, and 1936. Once again in 1950, the Senate Committee on Interstate and Foreign Commerce dealt with shipping problems in a comprehensive fashion and recognized the relationship between the contract rate system and the desirable objective of rate stability. Despite the fact that Congress has in the years since World War I considered the dual-rate system on several occasions, it has made no restrictive move towards dual-rate systems of any kind.

The Court of Appeals was in error when it held that Section 14 Third, even conceding *arguendo* that it applies to rate action, prevented the use of dual-rate systems in the following respects:

A. The language of Section 14, First of the Shipping Act does not prevent the payment of discounts in consideration for exclusive patronage, when such discounts are available to all shippers and are paid promptly upon the completion of the service.

B. When the Court of Appeals chose to read Section 14, Third to prohibit the dual-rate system

as being retaliatory and a discriminating method, it stripped the word "retaliation" of its accepted meaning.

C. The Court of Appeals by its reasoning has incorrectly ruled out incentive rates of any kind and is at variance with prior decisions of the Board and other courts which have considered the use of a dual-rate scale to be merely the making available of a discount to shippers willing to contract in advance to use the member lines of the Conference exclusively.

D. When the Shipping Act is read it is apparent that the words "discriminating or unfair methods" contained in Section 14, Third should be considered as modified by the word "unjustly". Any other interpretation of the clause does violence to the Shipping Act as a whole.

The decision below is in conflict with prior decisions of this Court. In the case of *U. S. Navigation* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), this Court specifically considered the contention that the dual-rate system involved in that case was unlawful *per se* and there rejected that contention. From the language of that decision, it appears that this Court recognized that a dual-rate system could be legal and that it was for the Board to make the necessary factual determination as to whether or not the use of the system should be permitted. Had the Court been of the opinion that a dual-rate system was illegal *per se* there would have been no purpose in referring the matter back to the Board. Once again in *Swayne & Hoyt* v. *United States*, 300 U. S. 297 (1937), this Court recognized that dual-rate systems do not *per se* violate the Shipping Act. By pointing out that the Board in earlier decisions had jurisdiction to pass upon dual-rate systems under the Shipping Act, we submit, this Court considered that such systems were not illegal *per se* under the Shipping Act.

The economic reasons which necessitated the institution of dual-rate systems by conferences in the first two decades of this century are equally valid today, and the continuance of the systems is essential for a healthy merchant marine and for adequate service in foreign commerce. There has been a marked increase in the size of vesssels used and a substantial increase in labor, manning and port charges, resulting in heavy fixed costs, so that Conference carriers must be assured of being able to carry minimum tonnage before they can economically schedule regular sailings. Only a few sailings with inadequate cargo would cause serious economic distress to these carriers. Unless the Conference carriers can obtain satisfactory commitments from shippers in return for their own commitments to pay for the necessary tonnage in the trade, they will always be in doubt as to whether or not there will be sufficient cargo available to fill their large ships at sailing times.

If the opinion below is upheld, it will destroy trading relationships prevailing throughout the world with shippers who have dealt for many years with the Conferences. In areas which have previously known quiet and reasonably stable ocean rates, the outbreak of rate wars with their consequent disastrous effects can be anticipated. Thus, the fundamental question before this Court includes matters of the greatest economic consequence to the commerce of the United States. American flag operators, because of high labor costs, would necessarily be the first to suffer under such circumstances. Stable ocean transportation requires stable rates, regularity of sailings and service, and financially responsible carriers. Without rate stability these objectives cannot be achieved.

ARGUMENT

POINT I.

The language of the Shipping Act, 1916, and its legislative history support the conclusion that the dual-rate system is not illegal *per se*.

The opinion below turns on Section 14, Third of the Shipping Act, 1916. However, any attempt to ascertain the meaning of that section must involve some exploration of the genesis of the Shipping Act of which it forms a part. Examination of the common law cases antedating regulation is equally helpful.

(A) The Common Law Background of Dual-Rates.

Prior to the Shipping Act, 1916, American Courts had to consider shipping problems against a common law background. A study of the contrasting holdings in the leading cases of *Lough* v. *Outerbridge*, 143 N. Y. 271 (1894), and *Menacho* v. *Ward*, 27 Fed. 529 (S. D. N. Y., 1886), is warranted because of the legal criteria developed therein in connection with the pivotal issue in this case. At the time those cases were decided, steamship Conferences had developed two methods of attracting shippers and meeting non-conference competition. These were the deferred rebate and the exclusive patronage dual-rate system. In the *Lough* case, *supra*, the Court made a clear-cut finding that an exclusive patronage dual-rate system was not unduly discriminatory, since the parties had made a special contract. The Court held that the carriers were justified in offering a discount in return for their reliance on the advance covenant of the shippers to give all their business to the carrier member lines of the Conference, and that they were similarly justified in refusing to make the lower rates available to other shippers who were unwilling to make a similar advance commitment.

The Court pointed out that a valid reason justifying the system was that it gave the carriers the assurance of a certain amount of cargo and put them in a position where they could better provide adequate frequent service for the shippers. Such service ultimately brought benefit to the shipping public in the form of lower and more stable rates. The Court was at pains to point out in the *Lough* case that the special contracts between the carriers and the shippers were entered into *in advance* of any movement. Therefore, the Court said, it was not possible that illegal discrimination could be involved.

The *Menacho* case, *supra,* is linked with the *Lough* case in tracing the development of the dual-rate system. In the *Menacho* case there were no dual-rate exclusive patronage contracts. There was no factor of choice given to the shipper, since no contracts were made in advance. The only two steamship berth carriers in the trade between New York and Cuba carried cargo for the plaintiff shippers at a certain rate. When these carriers discovered that the plaintiff shippers had given some of their business to outside tramp carriers, they arbitrarily increased the rates demanded of the plaintiff although maintaining the previous rate for other shippers. The Court emphasized that the carriers would have been justified in charging a lower rate to shippers who agreed *in advance* to patronize the carriers exclusively. However, on the facts, the Court properly decided that the carriers were discriminating against the plaintiff shippers because of their patronizing an outsider under circumstances where the shippers had no advance opportunity of choice.

It is notable that in the *Menacho* case, the Court used strong language in condemning the practice of the carriers who were defendants before it. It stigmatized their rate practices as odious and discriminatory. Even so, it did not denominate the higher rates charged the non-conforming shippers as retaliatory.

We submit, however, that, accepting a very broad and general connotation of the word "retaliation", it might be possible to bring within its compass the practice set forth in *Menacho* v. *Ward*, where the higher rate was charged because of past shipments by outside carriers. There the shippers were not given the opportunity to obtain the lower rate by entering into *advance* agreements. The distinction between *Lough* and *Menacho* points out clearly the inappropriateness of treating as retaliation the *advance* provision for two scales of rates, the lower of which is accorded to contract shippers where the contract is made available to all, irrespective of previous shipments by non-conference lines.

(B) The Alexander Committee's Analysis of Conference Competitive Methods was Accepted by Congress and Reflected in the Shipping Act, 1916.

The Alexander Committee Report[2] is the authoritative guide to Congressional purpose when the Shipping Act was enacted in 1916.

The House of Representatives had directed the Committee on Merchant Marine & Fisheries to conduct a thorough investigation of steamship Conferences as early as 1912. During the intervening years the Committee conducted its inquiry in a methodical all-embracing fashion under the direction of Professor S. S. Huebner and a brilliant staff. The Committee laid the ground work for the investigation by issuing very extended inquiries to all of the public bodies and commercial and shipping organizations who could throw light on the problem. The experience of the then-leading maritime nation, Great Britain, was examined in detail by study of the "Report of the Royal Commission on Shipping Rings", (: Alexander Report 4). The British Commission had been appointed at an earlier time to consider market conditions, character and volume of traffic,

[2] H. R. Doc. 805, 63d Cong., 2d Sess. (1914).

and competitive shipping conditions on the various world trade routes and had brought in its report in 1909.

When the Alexander Committee published the results of its investigation, the Committee, in Volume 4 of its Report, set forth the overriding considerations which led to its recommendations (4 Alexander Report 415-417):

> "In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses * * *.
>
> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to co-operate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.* Neither result can be prevented by legislation, and *either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.* Moreover, *steamship agreements and conferences are not confined to the lines engaging in*

the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and *to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets* as compared with their foreign competitors." (Emphasis added.)

The Alexander Committee specifically found that there were beneficial results flowing from Conference operation. These could be summarized as follows: First, the noticeable improvement in service in those trades where Conferences had succeeded in stabilizing the rates and planning fixed sailing dates. Rate and service stability aided merchants in making forward contracts and eliminated the waste and confusion resulting from carriers' placing ships on berth indiscriminately.

Second, under Conference operation the carriers could obtain capital more readily, since investors could see some likelihood of a return on their investment flowing from a long-continued stable rate picture. The Committee's decision was that the advantages justified the continuance of Conference operation substantially as it had been practiced up to the time of the Report, under the watchful eye of a regulatory agency. Therefore, when Congress acted on the Committee's recommendation, it made a conscious choice for regulated monopoly which would be subject always to the control of the Government Board set up by Congress to administer the Shipping Act.

The Alexander Report indicated to Congress an awareness of the competitive methods pursued by Conferences operating in the United States and Great Britain prior to the time the Report was made. These Conferences had striven to protect themselves defensively from the tramp ships and outside lines mainly by use of the deferred rebate

and the dual-rate system. In this respect the Committee referred to the dual-rate contracts as follows in Volume 4, at page 290.

> (a) "*Joint contracts made by the Conference as a whole.* Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms."

The Committee was careful to point out that the dual-rate system gave the shipper a free election at all times. The Committee noted that the undesirable element of postponement which could be found in deferred rebate systems was not present in the dual-rate system. The contracts offered to the shippers today by the Conferences, parties to this brief, are in all essential respects similar to the joint contracts discussed by the Committee.

The Alexander Committee conscientiously explored for Congress in its Report the record made by the Interstate Commerce Commission in the thirty years since its inception to ascertain whether or not international shipping should be pressed into the strict regulatory mold already fashioned by the Interstate Commerce Commission for domestic carriage. The Committee urged Congress to discard this approach in favor of one which threw the burden of regulation onto the Conferences already in being. Congress, in enacting the Shipping Act, turned its back on the Interstate Commerce Commission pattern. There-

fore, the Shipping Act represents Congressional recognition that international shipping must exist in a delicate balance among the several sovereign governments involved. The United States wisely stayed its hand insofar as direct rate control was concerned and chose instead to throw the burden of regulation on the carriers of every country touching these shores through preserving the Conference method, subject to a regulatory board.

The language of Section 15 of the Shipping Act is not merely permissive but constitutes a directive to the Board to foster co-operative effort by the carriers. The Section provides that "the Board *may*, by order, disapprove, cancel or modify any agreement", which it finds to be unjustly discriminatory, or otherwise violative of the Shipping Act, but the latter part of the Section requires that the Board "*shall* approve all other agreements, modifications or cancellations". (emphasis added).

(C) Subsequent Congressional Consideration of Dual-Rate Systems Shows a Pattern Consistent with the Earlier Congressional Views.

Conferences in the United States trades continued to use the dual-rate systems in the years immediately following World War I. This use was, of course, subject to the regulation under which the Board administered the Shipping Act, 1916. During this period Congress dealt frequently with merchant shipping affairs in sweeping fashion. Hearings were held from which evolved the Merchant Marine Acts of 1920, 1928, and 1936. During this period many Conferences instituted the dual-rate system. There is every indication that immediately prior to World War II, a great majority of the Conferences embracing carriers in the foreign trade of the United States were using the system. In the *Handbook of Merchant Marine Development and Regulation in the United States*, published as Annex 2 of the *Report of The Inter-American*

Maritime Conference, there is a notation at page 38 to the following effect:

> "A study made by the Maritime Commission in 1938 revealed that a great majority of the Conferences established in the foreign trade of the United States employed the contract rate system, both as regards outward and inward services."

The above would indicate that when Congress was considering the Merchant Marine Act of 1936, and the amendments of 1938, the dual-rate system was in use by most Conferences. A study of the hearings during this period gives no indication of any Congressional move to change or outlaw the system.

In 1950, the Senate Committee on Interstate and Foreign Commerce grappled with shipping problems in comprehensive fashion. This Committee, when it issued its Report Number 2494, 81st Congress 2d Session, pointed up at pages 84 and 85, the corollation between the contract rate system and the desirable objective of rate stability.

Congress has in the years subsequent to World War I considered the essentials of the dual-rate system on several occasions, but has made no restrictive moves of any kind.

POINT II.

The court below erred in holding that Section 14 prevents the use of dual-rate systems.

The prohibitions of Section 14 were well-flagged and well-defined. Lest there be any question about the extent of the prohibitions, the draftsmen of the Shipping Act were very careful to spell out specifically those items which were forbidden. The first prohibition was that of the deferred rebate. This was a well-recognized method which had been evolved in England to meet competitive condi-

tions. The Act states exactly what is meant by deferred rebates, namely rebates in return for a period of exclusive patronage but payable at a time after the end of that period if, and only if, during the period of deferment the exclusive patronage had been continued.

The language of Section 14, First is so carefully drawn and so narrowly defines the prohibited practice that it does not proscribe discounts in consideration for exclusive patronage which are available to all shippers and which are to be paid promptly upon the completion of the service, regardless of whether or not the shipper enters into a new contract.

Section 14, Second makes illegal the fighting ship. This was a device well-known at the time of the adoption of the Shipping Act, 1916, which was clearly recognized as a vessel used to exclude competition by forcing another carrier out of the trade.

Section 14, Third, provides:

> "That no common carrier by water shall, directly or indirectly . . . Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available o esort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

The very way in which this paragraph is framed suggests that Congress wanted to insure the shipper a free choice uninhibited by a fear of reprisal by denial of common carrier facilities.

Analysis of the paragraph shows that insofar as the dual-rate system is concerned, there is no retaliation by refusal of space accommodations. The only part of the section in issue in this case is the prohibition of "resort to other discriminating or unfair methods, because such shipper has patronized any other carrier . . . or for any other

reason." It appears that the Court of Appeals has chosen to read this section of subdivision Third to prohibit the dual-rate system as retaliatory and as a discriminating method. In so doing, the Court has written its own unique description of retaliation and has stripped the word of its accepted meaning. Further, it has read into this subdivision a reference to rate activity which does not appear in the statutory language.

The Court of Appeals' approach in the opinion below is that retaliation springs from the mere differentiation in rates between those shippers who do and those who do not agree to give Conference vessels their cargoes. The Court also found an element of retaliation in a provision for liquidated damages to make the carriers whole when, as, and if the shipper breaches the agreement.

In the opinion below the Court of Appeals decided that, despite the plain meaning of the contract setting forth the right to a lower rate for the shipper willing to contract with the member lines in advance, such contract constitutes retaliation because it is primarily aimed at keeping the shipper from giving his patronage to an outside carrier. To reach this decision the Court, in effect, makes a new contract for the parties, different in character and scope from the one for which they bargained. The Court finds support for its argument in the unwarranted assumption that contracts are only an insignificant incident in the steamship industry. This is an unrealistic attitude which completely overlooks the fact that a great part of the steamship business is concerned with contracts of one kind or another. Shippers and steamship companies are constantly making contracts in the form of booking agreements, bills of lading, mate's receipts, and a myriad of other documents needed to define clearly the changing relation of the parties in an essentially dynamic situation. The implication in the decision that the contract is a mere sham is very much at variance with the facts.

The Court of Appeals goes even further in making an additional finding that the carriers' insistence upon a contract in return for lower rates is retaliation even as against a shipper prepared to confine all of his cargo offerings to the Conference carriers, but not prepared to sign a contract for any one of a number of valid reasons. Even on the incorrect assumption that Section 14, Third has any bearing on rates, reasoning of this sort rules out incentive rates of any kind.

The Court of Appeals' rationale in this case is to be contrasted with that of the Board and other Courts which have examined the subject matter both prior and subsequent to the Shipping Act, 1916. The Courts and the Board have considered the dual-rate scale merely to be the making available of a discount to shippers willing to contract in advance to use the member lines of the Conference exclusively. The non-contract rate is charged to all other shippers *whether or not they confine their shipments to Conference members or go outside the Conference.* In their view, such a dual scale is neither an act of retaliation nor is it an "other discriminating or unfair method" within the meaning of Section 14, Third. As the Board has said in this case, retaliation is a powerful word, which by its very nature connotes vengeance or evil. Certainly, the adoption of a dual-rate system under circumstances where the shipper is perfectly free to agree to or decline to give his exclusive patronage to a group of water carriers hardly suggests the vengeful or punitive conduct of the type at which Congress directed Section 14, Third.

The argument has been mistakenly made that the mere charging of a higher rate to a shipper who does not want to be bound is an "other discriminating or unfair method". However, if the Shipping Act as a whole is read, it is apparent that the word "unjustly" should be considered as modifying the words "discriminating or unfair method".

Any other interpretation of this clause does violence to the Shipping Act as a whole.

Section 14, Fourth proscribes contracts which are *unjustly* discriminatory against shippers because of the volume of freight offered. The only sub-section of Section 14 mentioning contracts as such in any way, sub-section Fourth also prohibits certain practices with regard to space accommodations, loadings, landings, and claims adjustments which *unjustly* discriminate against any shipper.

When Section 15 of the Act is examined, it appears that the only discriminatory agreements condemned therein are those which are *unjustly* discriminatory. So too, under Section 16, Second, carriers are forbidden to allow shippers to obtain transportation at less than the regular rates or charges * * * by any other *unjust* or *unfair* device or means.

In Section 16. First, the language forbids carriers to confer *undue* or *unreasonable* preferences or to subject such shippers or traffic to *undue* or *unreasonable* prejudices.

Section 17, although slightly different in terminology from Section 16, forbids carriers to assess rates or fares which are *unjustly* discriminatory or *unjustly* prejudicial to enumerated persons. The uniform Congressional purpose which permeates the Shipping Act has been to guarantee, not that all preferences and discrimination be prohibited, but merely that the preference and discrimination which the Board finds to be *unfair, unreasonable or unjust* shall be forbidden.

Those who state that the dual scale of rates is retaliatory are victims of a serious misconception when they argue that the shipper is being retaliated against because he is using a carrier not a member of the Conference. This is simply not the fact. The difference between the two positions is much more than a mere exercise in semantics because, far from being retaliatory, the contract gives the shipper the right to make a conscious, willed decision. If the shipper wants to take advantage of the lower rate,

he must take stock of his position and must make the decision *in advance* to ship all of his goods on one or another of the Conference carriers. The carriers collectively are prepared to give an inducement to the shipper for signing such a contract. Proof of the lack of retaliation is the fact that even if the shipper should, in fact, ship all of his cargo during a given period by Conference vessel, he will nevertheless be required to pay the higher rate, unless he has executed the contract. Therefore, the non-signing shipper who patronizes the Conference exclusively is in exactly the same position as the non-signing shipper who patronizes the Conference and outside lines. From the point of view of the Conference, there is no difference between the non-signing shipper who patronizes the Conference exclusively and the one who uses both Conference and outside lines, because neither can be counted upon during any given period. The importance to the Conference of a shipper who has signed the contract is that the carriers, in reliance thereon, are able to project their plans and to space their sailings, secure in the knowledge that whatever freight the signatory shipper has will move over the Conference lines.

If there is any difference in treatment, it springs from the shipper's failure to make a decision as to whether or not he wants to give advance notice of his wishes to the carriers. No one appears to be shocked in the slightest at the idea that committees running public events give the patrons a conscious choice as to whether they want to retain their freedom of action up to the last minute and pay one price "at the door" or to send in their checks in advance at a lower price. Nor is anyone shocked at law book publishers whose practice it is to sell individual books or a multi-volume series at one price to those who agree in advance to buy the books or the series, and at another and higher price to those who do not agree in advance to make their purchases—those who are willing to pay for the

privilege of seeing how the books are received and what critical acclaim they obtain.

These examples are not, of course, four-square with the Conferences' contract, non-contract rate systems. In neither example, however, would reasonable people in their ordinary usage of the word say that buyers who had not agreed to make their purchases in advance, were the victims of "retaliation" at the hands of sellers who were willing to offer a discount for the benefits to them that came from advance planning.

According to the reasoning of the Court of Appeals, sellers would be retaliating against those people who insisted upon maintaining their freedom of choice until the last minute when they asked for ten per cent more in return for the maintenance of that freedom. It is patently obvious that a reasonable reduction is a fair and proper inducement to persuade people to make up their minds and to make commitments in advance. Such a discount can be measured against the enhanced certainty in planning and in the forestalling of waste which results when management knows in advance what commitments it must make.

Absent a special contract, the carriers generally cannot expect to secure the exclusive patronage of a shipper. However, the carriers are justified in relying on the shipper's agreement for exclusive patronage over a given period when such an agreement is lawfully entered into *in advance*. In return for the benefit derived by the carriers from the shipper's agreement, the carriers can reasonably offer some inducement in the form of a lower rate.

In *United States* v. *Prince Line*, 220 Fed. 230, 234 (S. D. N. Y., 1915), reversed as moot in 242 U. S. 537 (1917), the District Court undertook to spell out the business necessity for an exclusive patronage arrangement in the following language:

> "* * * A line providing regular sailings and undertaking to furnish sufficient space will presum-

ably learn by experience enough of conditions at the several ports at different seasons to enable it to calculate with reasonable accuracy what amount of cargo it may expect from its shippers for any particular sailing. Making provision accordingly, the vessel sailing will take her departure with substantially a full cargo. But if, when she reaches port, it is discovered that the calculations as to expected cargo were correct, but that some of her largest regular shippers had sent their merchandise off the week before by some tramp steamer, the regular vessel will have to sail with much unfilled cargo space. A few experiences of this sort might well involve a loss equal to, if not in excess of, the ten per cent * * *."

Under the theory advanced by those who claim that the dual-rate system is retaliatory, the contract signed by a shipper because of the attraction of cheaper rates is a contract which is grounded in force. The opponents of the system also assert that the shipper is, practically speaking, the victim of his own cupidity. This argument is unsound because the shipper who exercises a conscious choice to sign an exclusive contract in return for a lower rate scale is no more coerced than any other party to a contract who before entering into the contract weighs its benefits against its known burdens. Any shipper acting in good faith knows that he must assume some handicaps in the form of a restriction of choice when he makes a contract of any sort. In this sense the exclusive patronage dual-rate system is no different from any other contractual arrangement.

POINT III.

The decision of the Court of Appeals is in conflict with prior decisions of this Court.

While the Court below specifically conceded that the courts in prior decisions have not considered the dual-rate

system invalid *per se*, "otherwise the courts would have disposed of these cases on that ground", *Isbrandtsen Company, Inc.* v. *United States*, 239 F. 2d 933, 938 (C. A. D. C., 1956), it erred when it determined that prior cases had not decided the point. The decision below is in direct conflict with the language of this Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932).

In the *U. S. Navigation* case, *supra*, this Court specifically considered the contention that the dual-rate system involved in that case was unlawful *per se*. This Court in rejecting that contention, at pages 485, 487, said:

> "The * * * [Shipping Act] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. (Cases cited.)
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> "* * * Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

In *Far East Conference* v. *United States*, 342 U. S. 570 (1952), the argument was made most forcefully by the

Government that the dual-rate system involved in that case was unlawful *per se*. This Court reaffirmed the holding of *U. S. Navigation Co.* v. *Cunard S. S. Co., supra,* to the effect that the matter was one of primary administrative jurisdiction and that it was for the Board to make the factual determination as to whether or not a dual-rate system could be legal. The dissenting opinion in the case considered the dual-rate system to be illegal *per se* under Section 14, Third of the Shipping Act.

In addition, had this Court been of the opinion in the *U. S. Navigation* case, *supra,* that a dual-rate system was illegal *per se,* no purpose whatsoever would have been served by referring the controversy back to the Board if it had no statutory authority to permit the acts charged to the Conference lines. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562 (1919); *Pennsylvania R. R. Co.* v. *International Coal Mining Co.,* 230 U. S. 184, 197 (1913). It would not have been a proper case for the application of the primary administrative jurisdiction rule because only a question of law would have been involved. *Great Northern Railway Co.* v. *Merchants Elevator Co.,* 259 U. S. 285 (1922); *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.,* 227 F. 2d 60 (C. A. 2, 1955).

Once against in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297 (1937), this Court recognized that dual-rate systems do not *per se* violate the Shipping Act. The Court in a footnote to that opinion, at page 307, said:

> "The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e.g., pages 103-105, 200. The Committe recog-

nized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41."

By pointing out that the Board had jurisdiction to pass upon dual-rate systems under the Shipping Act, we submit this Court has recognized that such systems are not illegal *per se* under Section 14, Third of the Shipping Act.

The decision of the Court below directly conflicts with *Swayne & Hoyt* v. *United States, supra,* by failing to recognize that the Board has jurisdiction to determine whether a particular dual-rate system is justifiable.

POINT IV.

Failure to reverse the Court of Appeals would adversely affect the public interest.

The fundamental question before this Court involves matters of the greatest economic consequence to the nation. Should the decision of the Court of Appeals be affirmed, the foreign commerce of the United States and the Government's capacity to carry forward many major national policy objectives may be seriously impaired. Ocean carrier operations serve the public interest in many ways. Foreign commerce comprises a substantial portion of the national

economy, directly or indirectly affecting the employment of millions of Americans. In order to appreciate this, the importance of the dual-rate contract system to the functioning of steamship conferences and to world shipping must first be fully understood.

We submit that the disastrous economic effects that a decision against the dual-rate contract system would inevitably have on ocean transportation and the consequent disruption of that industry are such vital considerations in this case that the Court should hesitate before handing down such a decision in the face of long established administrative construction of a statute now some forty-one years old.

Certain fundamental conditions are well established among students of transportation economics and history as essential to promotion of trade and commerce. Summarily stated, these conditions are four in number: (1) stability of rates; (2) regularity of sailings and service; (3) financially responsible carriers; and (4) the absence of unjustifiable discriminations between shippers and of clandestine rebates or kickbacks.

Stability of rates, that is, the absence of frequently fluctuating rates and the capability of affording shippers reasonable assurance as to what a particular rate will be at the time a sale is consummated, is the most important single element involved. Without rate stability the other requirements cannot be achieved. This point was emphasized by the United States Delegation to the Inter-American Maritime Conference of 1940 which reported as follows:

> "* * * The experience of the past has shown that lines operating without conference agreements or other stabilizing influences will inevitably engage in rate wars which are harmful to trade and destructive of services. The inherent difficulties of regulating an international business such as shipping makes the conference system of self-regulation an acceptable

substitute for rigid governmental control of ocean rates. The continuance of the system is considered important if carriers are to maintain, improve, and perpetuate the regular, frequent, fast, and dependable service which is necessary to the continued growth of inter-American commerce." *Report of the Inter-American Maritime Conference*, page 144.

The basic fact of ocean transportation economics is that a system of unregulated competition dependent solely upon the operation of the forces of supply and demand does not function in the ocean transport industry. Historically the choice has been between the Conference system of self-regulation on the one hand and destructive cutthroat competition on the other. The disastrous consequences to carriers and shippers alike of the rate wars of the 1920's and the continued depressed rate levels of the 1930's attest to the unwholesome result of unrestricted competition outside the Conference system.

The operating costs of a half-empty vessel are not commensurably less than those of a vessel with a full cargo. In a system of uncontrolled competition each carrier is therefore subject to unrelenting pressure to cut prices and attract business. The invariable end product is rate wars. American flag operators, because of high labor costs, would necessarily be the first to suffer. Smaller carriers may face immediate bankruptcy. The effect of the foregoing is disruption of cargo movement and a decrease in this country's trade. This was recognized by the United States Delegates to the Inter-American Maritime Conference of 1940 who stated:

"* * * Merchants in great numbers informed the Government that they considered the conference system was necessary to assure them the stability of rates and the regular and dependable ocean transportation services which they required. * * *" *Report of Inter-American Maritime Conference*, page 150.

More recently, essentially the same conclusion was reported by the Senate Committee on Interstate and Foreign Commerce:

> "The small export shipper has been vociferous in the defense of the contract rate system, as it has enabled him to get equal rate treatment and thereby compete successfully in world markets with the large shippers." Senate Report No. 2494, 81st Congress, 2nd Session, page 85.

The Senate Committee found, in comparing rates of the period encompassing World War I to World War II, that the dual-rate system had in fact resulted in sensible control of rates in time of shipping shortage and had prevented fatal rate-cutting in time of overtonnage. Noting that the dual-rate system was under attack in the courts, the Committee nonetheless decided that the dual-rate system "appear[s] to be in the public interest" (p. 85). The decision of the Court of Appeals, if permitted to stand, would cripple the Conference system in its objective of rate stability.

In some other parts of the world, shipping Conferences protect themselves against rate warfare by the medium of the "deferred rebate" system, unlawful in the United States. In the United States a stable rate structure has been made possible in most trades by some form of the dual-rate contract.

The Conference system and the determination of rates by it is not peculiar to the ocean transportation industry. Basically the same method of rate determination is used by railroads, motor carriers, air lines, and ships in coastal trades, all of which determine their rates as groups. Similarly, they too operate under wide areas of exemption from the anti-trust laws.

The recurrent pattern of uncontrolled competition in the transportation industry leads invariably to destructive rate wars, inflicts heavy losses on carriers, shippers,

and the public, and is especially apt to present itself in the area of foreign transport. Congress has recognized, however that, whereas the competitive problems of this industry are analogous to those of railroading and coastwise shipping, a system of unilateral imposition of rates by any single government does not and cannot offer a practical solution. Secretary of State Cordell Hull explained the difficulty of unilateral national control to the delegates of the Inter-American Maritime Conference as follows:

> "In my opinion, a most serious objection to any unilateral attempt by this Government to fix rates in foreign commerce lies in the fact that this procedure would add one more form of restriction to the entangled and conflicting mass of nationalistic restrictions from which our foreign trade is suffering today. The impracticability of such unilateral regulation can readily be appreciated if one considers the impasse that would result if another government should adopt the same practice, but should prescribe rates covering its trade with us differing from those our authorities prescribed for the very same trade." *Report of the Inter-American Maritime Conference*, page 467.

The international steamship Conferences were established to provide for the industry a plan of voluntary self-regulation as the only practicable means of providing rate stability, regularly scheduled service, financially responsible carriers, and of eliminating unjust discrimination between shippers. Admission to Conference membership is freely available to any carrier wishing to obtain the benefits of Conference contracts. The Shipping Act, 1916, expressly recognized and explicitly sanctioned the Conference system. However, by requiring administrative approval of all Conference agreements and authorizing modification or subsequent cancellation of such agreements, the Act substantially strengthened the Conference structure by providing the means for governmental protection of the

public interest. Thus, in the case of an attempt by carriers to impose unreasonable regulations, effective administrative sactions have been provided.

The economic pressures which necessitated the institution of dual-rate systems by Conferences in the first two decades of this century have increased in the interim to the extent that today the continuance of the systems is essential for a healthy merchant marine and for adequate service in foreign commerce.

During the last thirty years there has been a marked increase in the average size of ships used in foreign commerce. Meanwhile, labor, manning, and port charges have risen astronomically. This combination of factors has resulted in such heavy, fixed costs that the Conference carriers must have some assurance of a minimum amount of cargo when they put their ships on the berth. It only takes a very few light sailings to cause serious economic distress to these carriers.

The availability of a pool of ships built during World War II has made it possible for marginal operators to skim the cream of a seasonal trade with chartered ships during the heavy shipping season. Later during the lighter shipping season, these predatory operators retire. Unless the Conference carriers can obtain satisfactory commitments from shippers in return for their own commitments to put the necessary tonnage into the trade, they must necessarily always be in doubt as to whether or not there will be sufficient cargo available to fill their large ships at sailing time. The assurance of a regular flow of cargo is a minimum requirement before the steamship operators can afford to risk the loss. When the dual-rate system is used, member lines can project traffic trends and make intelligent forecasts as to the cargo that will be offered to the group of ships by the shippers. The system gives the Conference carriers the knowledge to space sailings properly and provide ships of a proper size and design for the

trade. The Conference carriers, secure in the knowledge that they will obtain whatever cargo the signatory shippers forward in the trade, can with propriety invest the money needed to specialize or redesign their ships.

In order to enable shippers to make forward commitments, which are so very important in foreign trade, the Conferences guarantee that their rates will not be increased during the contract period, except after substantial periods of notice of intent to increase a certain rate, ranging up to 180 days. If a shipper does not approve of the increase, effective at the end of the notice period, then under the escape clause he may without restriction terminate his contract. On the other hand, if the Conferences make reductions in their rates, the shipper automatically receives the benefit of such reductions. Thus, a shipper in international trade is assured of stable transportation cost when he negotiates for foreign markets.

The opinion below, if upheld, will perforce destroy trading relationships pursued throughout the world by shippers who have dealt for many years with the Conferences, parties to this brief. In areas which have previously known quiet and reasonably stable ocean freight rates, we can only anticipate a return to the law of the jungle. The international trading relationships which have flourished under dual-rate systems in which shippers could make forward commitments, will almost certainly be set back, since thereafter every sale involving future delivery will be subject to unpredictable variation in freight rates.

Conclusion.

The Shipping Act was aimed at protecting American shipping and commerce from the severe blood-letting which has traditionally characterized rate wars on the high seas. The Conferences, the Association, and the carrier member lines thereof urge that the decision of the Court of Appeals

be reversed because that opinion is based on less than an adequate understanding of the basic purpose inherent in the Shipping Act, 1916.

We request that the decision of the Court of Appeals be reversed.

Respectfully submitted.

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APPENDIX A

STEAMSHIP CONFERENCES

Associated Steamship Lines (Manila)
Atlantic and Gulf-Indonesia Conference
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference
Atlantic and Gulf-Singapore, Malaya and Thailand Conference
Atlantic and Gulf/West Coast of Central America and Mexico Conference
Atlantic and Gulf/West Coast of South America Conference
Brazil/United States-Canada Freight Conference
Calcutta/U. S. A. Conference
Deli/New York Rate Agreement
East Coast Colombia Conference
East Coast South America Reefer Conference
Far East Conference
Gulf/French Atlantic Hamburg Range Freight Conference
Gulf/Mediterranean Ports Conference
Gulf/United Kingdom Conference
Havana Northbound Conference
Havana Steamship Conference
India, Pakistan, Ceylon & Burma Outward Freight Conference
Java-New York Rate Agreement
Leeward & Windward Islands & Guianas Conference
Mid Brazil/United States-Canada Freight Conference
New York Freight Bureau (Hong Kong)
North Brazil/United States-Canada Freight Conference
Pacific Indonesian Conference
Pacific Straits Conference
Pacific Westbound Conference
River Plate and Brazil Conference
River Plate/United States-Canada Freight Conference
Santiago de Cuba Conference
Straits/New York Conference
U. S. Atlantic and Gulf/Australia-New Zealand Conference
U. S. Atlantic & Gulf Ports-Jamaica (B. W. I.) S. S. Conference

U. S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference
United States Atlantic & Gulf-Haiti Conference
West Coast South America Northbound Conference
Pacific American Steamship Association*

THE FOLLOWING COMMON CARRIER STEAMSHIP LINES ARE MEMBERS OF ONE OR MORE OF THE FOREGOING CONFERENCES:

Aktieselskabet Atlas
Aktiebolaget Svenska Amerika Linien
Alcoa Steamship Company, Inc.
American Export Lines, Inc.
American Mail Line, Ltd.
Angfartygsaktiebolaget Tirfing
Armement Deppe, S.A.
A/S Atlantica
A/S J. Ludwig Mowinckels Rederi
Atlantic Ocean Transport Corporation
Bloomfield Shipping Company
Booth American Shipping Corporation
Buccaneer Line, Inc.
Cia. Argentina de Navegacion Dodero
Compagnie de Transports Oceaniques
Compagnie Generale Transatlantique
Compagnie Maritime Belge, S.A.
Compagnie Maritime Congolaise, S.C.R.L.
Compania Colombiana de Navegacion Maritima
Compania de Navegacion Dalpha, S.A.
Compania Maritima del Nervion
Compania Naviera Cubamar, S.A.
Compania Sud Americana de Vapores
Compania Transatlantica Espanola, S.A.
Dampskibsaktieselskabet Alaska
Dampskibsaktieselskabet Golden Gate
Dampskibsaktieselskabet Idaho
Dampskibsaktieselskabet Jeanette Skinner

* Association of United States steamship lines operating from the west coast of the United States.

Damps' ibsaktieselskabet Lisbeth
Dampskibsselskabet Torm
Deutsche Dampfschiffahrts-Gesellschaft "Hansa" Bren
Germany
Dovar S.A. International Shipping & Trading Co.
Eckert Steamship Corp.
Ellerman Lines, Ltd.
Ellerman & Bucknall Steamship Co., Ltd.
Federal Steam Navigation Co., Ltd.
Flota Mercante del Estado
Flota Mercante Grancolombiana, S.A.
Grace Line, Inc.
Gulf & South American Steamship Co., Inc.
Hall Line, Ltd.
Hamburg Amerika Linie
Hamburg-Suedamerikanische Dampfschiffahrts
Gesellschaft Eggert & Amsinck
Hellenic Lines Limited
Hugso Stinnes O. H. "Brenntag", Brennstoff-,
Chemikalien-und Transport, G.m.b.H.
Hvalfangstaktieselskapet Suderoy
Isthmian Lines, Inc.
Israel America Line, Ltd.
Khedival Mail Line, S.A.E.
Koninklijke Rotterdamsche Lloyd, N.V.
Lamport & Holt Line, Ltd.
Larrinaga Steamship Co., Ltd.
Lloyd Brasileiro
Marina Mercante Nicaraguense, S.A.
Matson Navigation Company
M. Dizengoff & Co. (Shipping) 1949, Ltd.
M. Dizengoff & Co. (Navigation) 1951, Ltd.
Mississippi Shipping Co., Inc.
Moore-McCormack Lines, Inc.
Naviera Vacuba, S.A.
Navigazione Alta Italia-Genoa
New Zealand Shipping Co. Ltd.
Norddeutscher Lloyd
North Atlantic & Gulf Steamship Company, Inc.
Nitto Shosen Co. Ltd.
N. V. Koninklijke Paketvaart Maatschappij

N. V. Nederlandsch-Amerikaansche Stoomvart-Maatschappij-"Holland-Amerika Lijn"
N. V. Stoomvart Maatschappij "Nederland"
Ozean Linie G.m.b.H.
Pacific Far East Line, Inc.
Pacific Transport Lines, Inc.
Panama Canal Company
Philippine National Lines
Port and Associated Lines
Prince Line, Ltd.
Prudential Steamship Corporation
Rederiaktiebolaget Disa
Rederiaktiebolaget Fredrika
Rederiaktiebolaget Poseidon
Rederiaktiebolaget Svenska Lloyd
Royal Netherlands Steamship Company
Skibsaktieselskapet Abaco
Skibsaktieselskapet Arizona
Skibsaktieselskapet Aruba
Skibsaktieselskapet Astrea
Skibsaktieselskapet Marie Bakke
Skibsaktieselskapet Noruega
Skibsaktieselskapet Ogeka
Skibsaktieselskapet Pacific
Skipsaksjeselskapet Hilda Knudsen
Skipsaksjeselskapet Samuel Bakke
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Skagerak
Skipsaktieselskapet Vito
States Steamship Company
Stockard Steamship Corporation
Stockholms Rederiaktiebolag Svea
The Bank Line Limited
The Booth Steamship Co., Ltd.
The City Line, Ltd.
The Cunard Steam-Ship Company Ltd.
The East Asiatic Company, Ltd.
The Northern Pan-America Line, A/S
Thos. and Jas. Harrison, Ltd.
Thos. & Jno. Brocklebank, Ltd.

Three Bays Corp., Ltd.
United Fruit Company
Van Nievelt, Goudriaan & Co.'s Stoomvaart Maatschappij N.V.
Victorias Milling Company, Inc.
Ward Garcia, S.A.
West Coast Line
Westfal-Larsen & Co., A/S
Westley Shipping Co., Inc.
Zim Israel Navigation Co., Ltd.

Certificate

I, John R. Mahoney, Counsel for the *amici curiae* in Appendix A of the foregoing Brief, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of August, 1957, I served copies of the foregoing Motion to file Brief and Brief *Amicus Curiae* on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid.

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John R. Mahoney